



SAN FRANCISCO PLANNING DEPARTMENT

March 14, 2016

Ms. Angela Calvillo, Clerk
Honorable Supervisor Kim
Board of Supervisors
City and County of San Francisco
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

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**Re: Transmittal of Planning Department Case Number 2015-01826PCA:
Permitting Accessory Massage Uses with a Conditional Use Permit in the North
Of Market Residential Special Use District
Board File No. 151280
Planning Commission Recommendation: Approval**

Dear Ms. Calvillo and Supervisor Kim,

On March 10, 2016, the Planning Commission conducted duly noticed public hearings at regularly scheduled meetings to consider the proposed Ordinance that would amend Planning Code Section 249.5, introduced by Supervisor Kim. At the hearing the Planning Commission recommended approval.

The proposed amendments are not defined as a project under CEQA Guidelines Section 15060(c) and 15378 because they do not result in a physical change in the environment.

Please find attached documents relating to the actions of the Commission. If you have any questions or require further information please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Aaron D. Starr", with a long horizontal line extending to the right.

Aaron D. Starr
Manager of Legislative Affairs

cc:
Andrea Ruiz-Esquide, Deputy City Attorney
April Ang, Aide to Supervisor Kim
Andrea Ausberry, Office of the Clerk of the Board

Transmittal Materials

**CASE NO. 2015-018261PCA
Permitting Accessory Massage Uses, with a Conditional Use Permit,
In the North of Market Residential Special Use District**

Attachments :

Planning Commission Resolution

Planning Department Executive Summary



SAN FRANCISCO PLANNING DEPARTMENT

Planning Commission Resolution No. 19587 HEARING DATE MARCH 10, 2016

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Project Name: Permitting Accessory Massage Uses with a Conditional Use Permit in the North of Market Residential Special Use District
Case Number: 2015-018261PCA [Board File No. 151280]
Initiated by: Supervisor Kim / Introduced December 15, 2016
Staff Contact: Diego R Sánchez, Legislative Affairs
diego.sanchez@sfgov.org, 415-575-9082
Reviewed by: Aaron D Starr, Manager of Legislative Affairs
aaron.starr@sfgov.org, 415-558-6362

RECOMMENDING THAT THE BOARD OF SUPERVISORS ADOPT A PROPOSED ORDINANCE THAT WOULD AMEND PLANNING CODE SECTION 249.5 TO PERMIT ACCESSORY MASSAGE USES, WITH CONDITIONAL USE PERMIT, IN THE NORTH OF MARKET RESIDENTIAL SPECIAL USE DISTRICT; ADOPTING FINDINGS, INCLUDING ENVIRONMENTAL FINDINGS, PLANNING CODE SECTION 302 FINDINGS, AND FINDINGS OF CONSISTENCY WITH THE GENERAL PLAN AND PLANNING CODE SECTION 101.1.

WHEREAS, on December 15, 2016 Supervisor Kim introduced a proposed Ordinance under Board of Supervisors (hereinafter "Board") File Number 151280, which would amend Section 249.5 of the Planning Code to permit accessory massage uses, with conditional use permit, in the North of Market Residential Special Use District;

WHEREAS, The Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting to consider the proposed Ordinance on March 10, 2016; and,

WHEREAS, the proposed Ordinance has been determined to be categorically exempt from environmental review under the California Environmental Quality Act Section 15060(c); and

WHEREAS, the Planning Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of Department staff and other interested parties; and

WHEREAS, all pertinent documents may be found in the files of the Department, as the custodian of records, at 1650 Mission Street, Suite 400, San Francisco; and

WHEREAS, the Planning Commission has reviewed the proposed Ordinance; and

MOVED, that the Planning Commission hereby recommends that the Board of Supervisors **approve** the proposed ordinance.

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. Regulations on massage uses must strike a balance between the need to increase access to massage therapy with the need to equip the City with adequate regulatory tools to assure the safe, legitimate and compatible operation of massage uses.
2. The City can strike that balance between competing needs in two ways. First, by enacting regulations that allow for smaller scaled massage uses to open in areas where they were once largely prohibited. Second, by concurrently requiring a permitting process that is transparent and an approval that is revocable and that applies performance standards to ensure safe operation.
3. Amending the regulations in the North of Market Residential Special Use District to allow accessory massage uses with Conditional Use authorization strikes this balance.
4. **General Plan Compliance.** The proposed Ordinance is consistent with the following Objectives and Policies of the General Plan:

COMMERCE AND INDUSTRY ELEMENT

OBJECTIVE 1

MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKING ENVIRONMENT.

Policy 1.1

Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development which has substantial undesirable consequences that cannot be mitigated.

Policy 1.2

Assure that all commercial and industrial uses meet minimum, reasonable performance standards.

The proposed Ordinance will facilitate the establishment of a retail use that provides net benefits to its patrons and the neighborhood in general. Any potential undesirable consequences will be addressed through existing regulatory controls, including performance standards, by the Planning and Health Departments.

OBJECTIVE 2

MAINTAIN AND ENHANCE A SOUND AND DIVERSE ECONOMIC BASE AND FISCAL STRUCTURE FOR THE CITY.

Policy 2.1

Seek to retain existing commercial and industrial activity and to attract new such activity to the city.

Policy 2.3

Maintain a favorable social and cultural climate in the city in order to enhance its attractiveness as a firm location.

The proposed Ordinance allows new commercial activity in a special use district where it once was largely prohibited. This added commercial activity will help maintain a favorable social and cultural climate in San Francisco as it adds to the number of retail activities available to employees. This enhances San Francisco as a firm location.

5. **Planning Code Section 101 Findings.** The proposed amendments to the Planning Code are consistent with the eight Priority Policies set forth in Section 101.1(b) of the Planning Code in that:

1. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced;

The proposed Ordinance will have a beneficial effect on neighborhood serving retail uses as it will allow new commercial uses to locate in the North of Market Residential Special Use District and will not have a negative effect on opportunities for resident employment in and ownership of neighborhood-serving retail.

2. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods;

The proposed Ordinance will help conserve the existing housing and neighborhood character, thereby preserving the cultural and economic diversity of the City's neighborhoods.

3. That the City's supply of affordable housing be preserved and enhanced;

The proposed Ordinance will not have an adverse effect on the City's supply of affordable housing as it relates only to regulations on non-residential activities.

4. That commuter traffic not impede MUNI transit service or overburden our streets or neighborhood parking;

The proposed Ordinance will not result in commuter traffic impeding MUNI transit service or overburdening the streets or neighborhood parking because the Ordinance concerns itself with regulations on a minor, accessory retail activity.

5. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced;

The proposed Ordinance will not cause displacement of the industrial or service sectors due to office development, and future opportunities for resident employment or ownership in these sectors would not be impaired because the Ordinance will relax regulations on a retail sales and service use within one special use district.

6. That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake;

The proposed Ordinance will not have an adverse effect on City's preparedness against injury and loss of life in an earthquake because the Ordinance modifies regulations on a retail activity.

7. That the landmarks and historic buildings be preserved;

The proposed Ordinance will not have an adverse effect on the City's Landmarks and historic buildings because the Ordinance concerns itself with regulating a retail sales and service use category.

8. That our parks and open space and their access to sunlight and vistas be protected from development;

The proposed Ordinance will not have an adverse effect on the City's parks and open space and their access to sunlight and vistas because it concerns the regulation of a retail sales and service use.

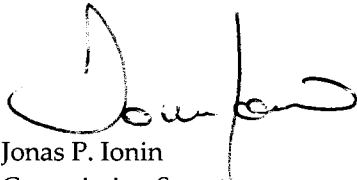
- 8. Planning Code Section 302 Findings.** The Planning Commission finds from the facts presented that the public necessity, convenience and general welfare require the proposed amendments to the Planning Code as set forth in Section 302.

**Resolution No. 19587
March 10, 2016**

**CASE NO. 2015-018261PCA
Permitting Accessory Massage Uses, with a Conditional Use
Permit, in the North of Market Residential Special Use District**

NOW THEREFORE BE IT RESOLVED that the Commission hereby recommends that the Board ADOPT the proposed Ordinance as described in this Resolution.

I hereby certify that the foregoing Resolution was adopted by the Commission at its meeting on March 10, 2016.



Jonas P. Ionin
Commission Secretary

AYES: Commissioners Antonini, Fong, Hillis, Johnson, Moore and Richards

NOES: None

ABSENT: Commissioner Wu

ADOPTED: March 10, 2016



SAN FRANCISCO PLANNING DEPARTMENT

Executive Summary Planning Code Text Amendment

HEARING DATE: MARCH 10, 2016
EXPIRATION DATE: MARCH 22, 2016

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Project Name: **Permitting Accessory Massage Uses, with a Conditional Use Permit, in the North of Market Residential Special Use District**

Case Number: **2015-018261PCA [Board File No. 151280]**

Initiated by: **Supervisor Kim / Introduced December 15, 2016**

Staff Contact: **Diego R Sánchez, Legislative Affairs
diego.sanchez@sfgov.org, 415-575-9082**

Reviewed by: **Aaron D Starr, Manager of Legislative Affairs
aaron.starr@sfgov.org, 415-558-6362**

Recommendation: **Recommend Approval**

PLANNING CODE AMENDMENT

The proposed Ordinance would amend Planning Code Section 249.5 to permit, with Conditional Use Authorization (CU), massage uses accessory to a Personal Service use in the North of Market Residential Special Use District.

The Way It Is Now:

Massage uses are not permitted in the North of Market Residential Special Use District unless they are accessory to the following uses:

- Hospitals
- Residential Care Facilities
- Health Services
- Social Service or Philanthropic Facility uses; and
- health clubs, gymnasiums or other facilities with a regular membership or one which is used primarily for instruction in body building, exercising, reducing sports, dancing or other similar physical activities.

The Way It Would Be:

In addition to the uses listed above, massage uses accessory to a Personal Service use would also be permitted, with CU, in the North of Market Residential Special Use District.

BACKGROUND

The North of Market Residential Special Use District

Established in 1985, the North of Market Residential Special Use District (NMRSUD) is within the Tenderloin neighborhood (See Exhibit B: Map of the North of Market Residential Special Use District). This neighborhood, largely zoned RC-4 (Residential-Commercial, High Density), is characterized by buildings with upper story residential uses above commercial uses. The stated purpose of the NMRSUD

is to preserve the residential character of the neighborhood by protecting the existing housing stock and allowing new infill housing at compatible densities. Commercial developments that may adversely affect the residential character are to be limited.

The purpose of the NMRSUD is reflected in the additional controls the NMRSUD establishes. For example, commercial uses are generally limited to the ground floor and the first basement floor. They may locate on the second floor, but require CU to do so. This is done, in part, to prevent the loss of upper story residential units and to maintain the prevailing character of the neighborhood.

The NMRSUD also regulates the types of commercial uses that may be established. It generally prohibits new off-sale liquor licenses and contains multiple good neighbor policies for those existing off-sale liquor establishments. In the same vein, fringe financial uses are prohibited in the NMRSUD. Massage establishments in the NMRSUD are also strictly regulated as it has been found that they are, at times, used as fronts for illicit activity.¹ Unless they are accessory to institutional uses like hospitals or retail uses focused on physical activities massage uses are prohibited

Origins of the Ordinance

The Ordinance originated from a stakeholder request to Supervisor Kim's office requesting a relaxation of the massage controls in the NMRSUD. Staff understands that the stakeholder is establishing a therapeutic health spa in the NMRSUD. Activities will include hot water baths, steam rooms and massage therapy. However, because massage therapy is prohibited when incidental to those activities the stakeholder cannot offer those services. The Ordinance would permit massage therapy incidental to those uses with CU and apply specific operating practices to the massage component.

ISSUES AND CONSIDERATIONS

Use Definitions: Personal Service, Health Service and Massage Establishments

The Planning Code defines a Personal Service use as a use providing grooming services to an individual. Salons, cosmetic services and tattoo parlors fall into this category. The Planning Code also considers retail uses that provide traditional therapeutic treatments, such as bathhouses and steam rooms, as Personal Service uses. The Planning Code distinguishes between these traditional therapeutic uses and health care services provided by professionals licensed by State-sanctioned Boards such as physicians, dentists and psychologists. The Planning Code considers the later as Health Service uses.

The Planning Code also provides a distinct definition for Massage Establishments. This definition relies on Article 29 of the Health Code to define the types and nature of activities that are considered massage. In this definition the Planning Code indicates that CU is required to establish a massage use anywhere in

¹ "Sex Trafficking." *Polaris Project*. Polaris 2016. Web. 16 February 2016. <https://polarisproject.org/sex-trafficking>; "Hotline Statistics." *National Human Trafficking Resource Center*. Polaris 2016. Web. 16 February 2016. <https://traffickingresourcecenter.org/states>.; Environmental Health Protection, Equity and Sustainability Branch. San Francisco Department of Public Health. Report on Licensing and Regulation of Massage Establishments in San Francisco. 2013. <https://www.sfdph.org/dph/files/EHSdocs/ehsMassagedocs/massage%20establishment%20report%20140224.pdf>

the City. However, it also lists a number of massage uses exempted from the CU requirement. These include chair massage completely open to the public view, a Sole Practitioner Massage Establishment, as defined in the Health Code, and massage accessory to large institutions or large tourist hotels.

Recent Massage Regulation

Regulations for massage uses must strike a balance between two competing goals. The first is to recognize the importance of massage therapy as a healing art and increase its accessibility to those in need of treatment. The second is to equip the City with adequate regulatory tools to assure the safe, legitimate and compatible operation of massage uses.

Over the last decade and a half, the regulatory environment for massage uses has markedly changed, largely influenced by that balancing act. For example, prior to 2004 regulatory authority over massage uses was primarily the domain of the Police Department. This was largely due to the City's view of massage therapy as an off-shoot of adult entertainment.² The City signaled a change in its perspective on massage when it entrusted the Department of Public Health (DPH) with permitting authority over massage uses in 2004.³ By shifting authority to DPH and away from the Police Department, the City acknowledged that massage therapy was unmistakably different from adult entertainment. It also acknowledged DPH's capacity to regulate and enforce the health and safety standards of a therapeutic discipline.

A more recent example of this balancing act is embodied in Supervisor Tang's 2015 Massage Establishments Ordinance.⁴ This Ordinance reestablished the CU requirement for most massage uses and required all massage practitioners and establishments to secure licenses from DPH. These requirements afforded a public process to assess necessity and desirability of the massage use and assure neighborhood compatibility given an area's existing retail composition. It also provided an effective enforcement tool given that the authorization is revocable in the event of code violations. Lastly, with the involvement of DPH, additional oversight was provided, thereby further assuring safe and legitimate operations. These enforcement tools are valuable to the effort to prevent the use of massage establishments as fronts for forced labor and prostitution.⁵

At the same time, the Ordinance maintained and expanded upon the breadth of massage uses exempted from the CU requirement. This created a simpler permitting process for smaller scale massage uses. The Ordinance also created an amnesty program for massage establishments that had not secured local land use entitlements. This helped bring massage uses under one local regulatory program.

² The Planning Code considers adult bookstores, adult theaters and encounter studios (establishments providing booths, rooms or stalls wherein an entertainer provides entertainment to patrons or members within the aforesaid booths, rooms or stalls) as adult entertainment uses.

³ Board File 030995 <https://sfgov.legistar.com/View.ashx?M=F&ID=2600565&GUID=4DC26B04-364E-4A7B-AEB5-190B271594F3>

⁴ Board File 141303 <https://sfgov.legistar.com/View.ashx?M=F&ID=3770126&GUID=E2B7CDFC-A9B7-41CA-AAD6-8B1349DD9BB9>

⁵ "Sex Trafficking." *Polaris Project*; "Hotline Statistics." *National Human Trafficking Resource Center*.

New massage regulations should follow this pattern of providing new access to massage therapy while affording regulatory agencies the proper tools to assure safe operations and neighborhood compatibility. By doing this, the City facilitates the growth of small business in a manner that balances the needs of all stakeholders.

IMPLEMENTATION

The Department has determined that this ordinance will not impact our current implementation procedures.

REQUIRED COMMISSION ACTION

The proposed Ordinance is before the Commission so that it may recommend adoption, rejection, or adoption with modifications to the Board of Supervisors.

RECOMMENDATION

The Department recommends that the Commission recommend *approval* of the proposed Ordinance and adopt the attached Draft Resolution to that effect.

BASIS FOR RECOMMENDATION

The Department supports the Ordinance because it increases access to a therapeutic service and fosters small business expansion. It also provides the City with adequate regulatory and enforcement mechanisms to assure safe operation and neighborhood compatibility.

Organization and Consistency of Controls

Locating the proposed new massage regulations in the "Controls" subsection of the NMRSUD eases their implementation and the overall legibility of the NMRSUD. It avoids referencing multiple subsections of the NMRSUD and minimizes missing the new controls. This is contrast to a 2007 Ordinance that added fringe financial controls in its own subsection at the end of the NMRSUD.⁶

The proposed new massage regulations also generally align with existing provisions on accessory uses in the RC districts. The vast majority of properties in the NMRSUD are within the RC-4 zoning district. Planning Code Section 204.3, Accessory Uses for Uses other than Dwellings in C, RC, M and PDR Districts, already regulates accessory uses in the RC-4. Because these regulations exist, it makes sense to require any newly allowed accessory use, including massage uses, to generally conform to these controls.

The proposed new massage regulations also align with the hours of operation in existing Health Code regulations. San Francisco Health Code Section 29.31 regulates the operating practices for massage uses throughout the City. Among those operational practices regulated are the hours of operation. The

⁶Board File 070671 <https://sfgov.legistar.com/View.ashx?M=F&ID=2593950&GUID=5810D993-093D-4242-AD5D-26C2660672C1>

Health Code expressly prohibits the provision of massage services between the hours of 10:00pm and 7:00am. The Planning Department's standard Conditions of Approval for massage uses also adhere to these restrictions on hours of operation. For consistency's sake, it is reasonable to align the new accessory provisions in the NMRSUD with existing, City-wide regulations on the hours of operation.

Owning to the subordinate and incidental nature of accessory uses, it is important that they are inaccessible to the public when the principal use is closed. If the accessory use remains open beyond the hours of operation of the principal use, the accessory use becomes the primary use of that space. This would be in direct conflict with the Planning Code's intent for accessory uses. The proposed language in the Ordinance that reinforces this relation between accessory and principal use is therefore important and helps clarify this dynamic.

Conditional Use Authorization

Maintaining the CU requirement is advantageous or appropriate for a number of reasons. The first is the public nature of the process, including the neighborhood notification and Commission hearing. This process helps to filter less scrupulous or thoughtful proposals. This is especially important in Tenderloin neighborhood, given recent DPH findings of the overlap between massage establishment locations and areas with higher incidences of prostitution related crimes.⁷

The second reason maintaining CU is appropriate is because it is in line with the recent changes to massage regulation and their intentions. Specifically, Supervisor Tang's 2015 Massage Establishments Ordinance reinstated the citywide CU requirement for the majority of massage uses. This ensured that neighborhood concentration and compatibility concerns can be analyzed and discussed in a public forum. This tool can be especially useful in the Tenderloin neighborhood given the stated purpose of the NMRSUD.

Lastly, requiring CU is advantageous and appropriate because of the Conditions of Approval the Planning Commission applies to the authorization. These Conditions set a minimum performance standard, establish a monitoring and enforcement protocol, indicate the revocability of the authorization and require the identification of a community liaison. For massage uses the Conditions of Approval are tailored to assist in the enforcement duties of the Planning Department. They also reiterate that the authorization may be revoked and the establishment closed. This is ultimately the strongest tool the Planning Department has to guarantee safe and legitimate operation of any massage use.

ENVIRONMENTAL REVIEW

The proposed amendments are not defined as a project under CEQA Guidelines Section 15060(c)(2) and 15378 because they do not result in a physical change in the environment.

⁷ San Francisco Department of Public Health. Report on Licensing and Regulation of Massage Establishments in San Francisco. 2013.

PUBLIC COMMENT

As of the date of this report, the Planning Department has not received any public comment regarding the proposed Ordinance.

RECOMMENDATION: Recommendation of Approval with Modification

Attachments:

- Exhibit A: Draft Planning Commission Resolution
- Exhibit B: Map of the North of Market Residential Special Use District
- Exhibit C: Letters of Support
- Exhibit D: Board of Supervisors File No. 151280